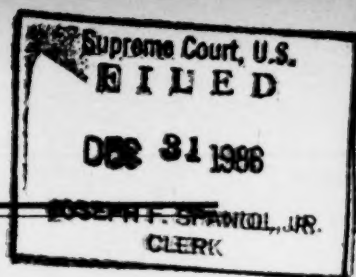


(2)
No. 86-921



IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUGHES A. BAGLEY,

v.

IOWA BEEF PROCESSORS, INC.,

Petitioner,

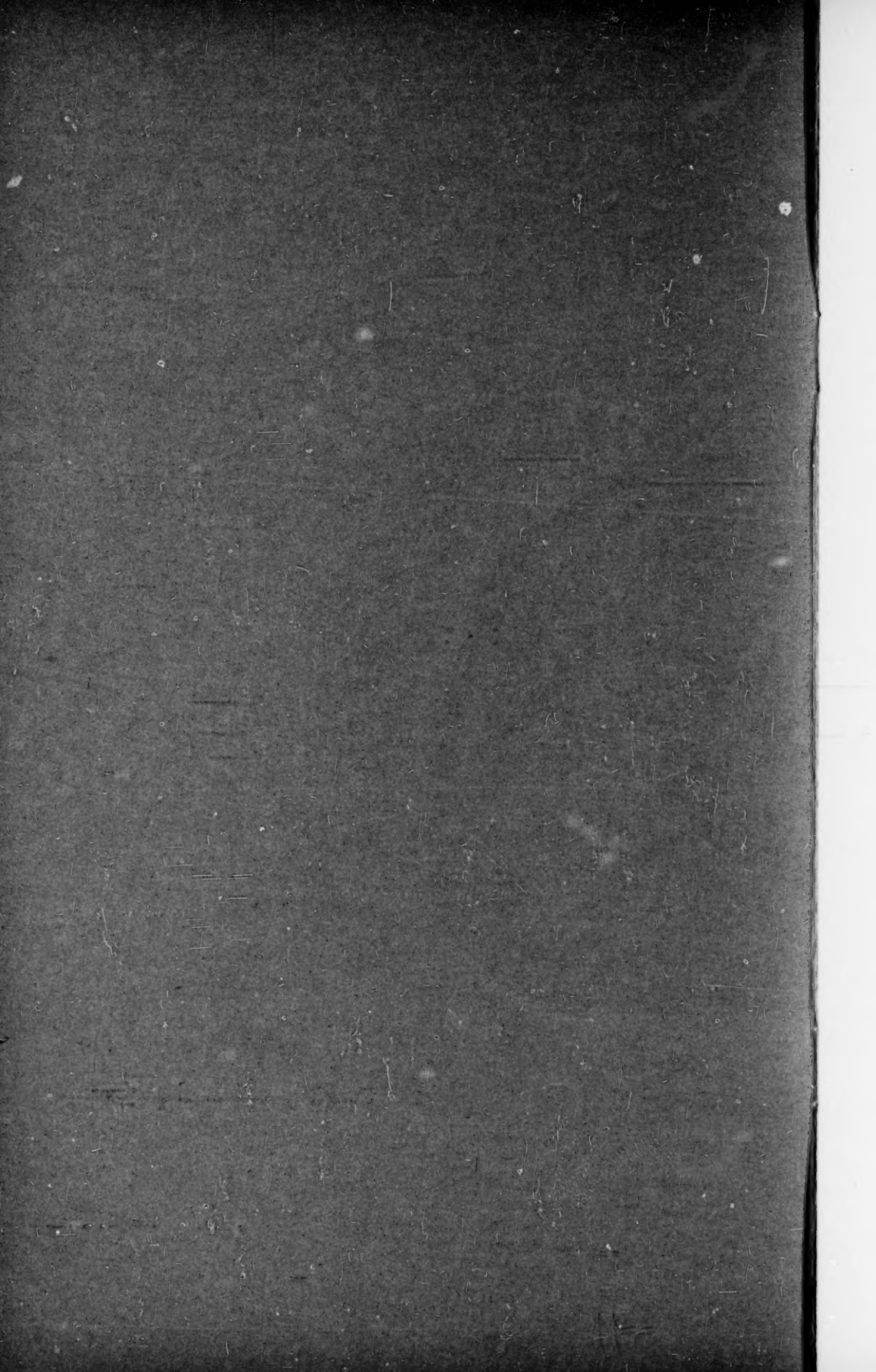
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IBP, INC. IN OPPOSITION
TO PETITIONER BAGLEY'S PETITION
FOR A WRIT OF CERTIORARI

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REQUIRED LISTING OF RELATED COMPANIES

Respondent IBP, inc. is a wholly-owned subsidiary of Occidental Petroleum Corporation.

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<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 106 S. Ct. 1558 (1986)	



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IBP respectfully suggests that Bagley's petition for certiorari should not be granted. While Bagley agrees with IBP that this Court should review this case, he has filed a petition for certiorari that raises totally different issues than those raised in IBP's petition.¹ Bagley's petition does not raise novel questions, and it does not find any conflict with Supreme Court precedent or between circuits.

Bagley claims that IBP was not engaged in genuine petitioning activity because it distributed its petition beyond the Government forum. Both the panel and the *en banc* Eighth Circuit expressly found that IBP sent its petition *only* to the Subcommittee members. IBP then specifically refused all requests for copies of the petition until several months later—after a leak to the media that resulted in widespread reporting of the petition's contents. (IBP Petition Appendix (hereinafter "P.A.") C at 13-14; P.A. A at 8.)

¹ IBP's petition for certiorari in this cause has been docketed as No. 86-956.

Bagley's argument also fails as a matter of law. This Court has squarely and unanimously held that the protection for petitioning extends to a publicity campaign directly aimed at influencing Government action. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). See also *National Association for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

Bagley also seeks review of the Eighth Circuit's refusal to hold that the trial court's unconstitutional instruction (that IBP had the burden of proving truth) was harmless error. His claim is predicated on the fact that the jury had also been instructed that Bagley was required to prove actual malice to recover punitive damages. But the *only* jury instructions concerning the issue of truth or falsity were the instructions that unconstitutionally told the jury that the burden was upon IBP to prove truth. (Jury Instructions Nos. 8 and 9, Tr. 2269-2270.) The instructions concerning actual malice and punitive damages are silent as to the burden of proving truth or falsity. (Jury Instructions Nos. 27 and 28, Tr. 2277-2278.)² The imposition of *any* damages without a determination that the plaintiff has proved falsity is expressly forbidden by *Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558, 1563-64 (1986).³

²The punitive damages instructions are also defective because they fail to limit the jury's consideration of whether there was actual malice to the two statements in the thirty-one page letter alleged to be libelous, or even to those statements in the letter that were of and concerning Bagley. (Jury Instructions Nos. 27 and 28, Tr. 2277-2278.)

³*Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), cited in Bagley's petition for certiorari, in no way supports his position. The jury in *Butts* had specifically been instructed that it was required to find that the statements were in fact false as a prerequisite to awarding *any* damages. *Id.* at 166 (Warren, C.J., concurring in the result).

CONCLUSION

Bagley's petition for certiorari raises no issues that should be the subject of review by this Court.

Respectfully submitted

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INSTRUCTION NO. 8

In order for Plaintiff to recover damages on his claim for libel, the burden is upon him to prove by a preponderance of the evidence each of the following propositions:

1. That the Defendant published a letter concerning the Plaintiff which was a libel as that term is defined in these instructions.

2. That the Defendant published the letter with knowledge that it was false.

3. That the libel was read by members of the general public.

4. That as a proximate result of the Defendant's actions, the Plaintiff sustained damages.

If the Plaintiff has established all of the foregoing propositions by a preponderance of the evidence, then your verdict will be for the Plaintiff and you will consider the matter of damages. If the Plaintiff has failed to establish one or more of the foregoing propositions, your verdict will be for the Defendant.

INSTRUCTION NO. 9

The words complained of by the Plaintiff in the Peterson letter, specifically, that "he stole 7 boxes of IBP documents" and that "Bagley's version of IBP's quantity discount program is absolutely false, and . . . constitutes perjury," are libelous per se in that the words themselves tend to disgrace and degrade him. Such words create a legal presumption of their falsity thus shifting to the Defendant the burden of proving the truth of the statements by a preponderance of the evidence. Also such words create a presumption of injury and damage even if actual pecuniary damages cannot be proved.

It is for you to determine from all the evidence in the case whether the statements complained of are true. Proof of the

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truth of said statements is a defense to Plaintiff's cause of action for libel and, if established, your verdict should be for the Defendant on Plaintiff's libel claim.

* * *

INSTRUCTION No. 27

If you find that plaintiff has established the essential elements of his libel claim and if you find, on the basis of clear and convincing evidence that the defendant acted with actual malice in publishing the writing in question, then you may award the plaintiff punitive damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as an example to others. Whether or not to award such damages, and the amount thereof, are matters confided to you for decision.

INSTRUCTION No. 28

A publication is made with "actual malice," as that term is used in this charge, if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not.

